

Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights

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I. Introduction

Governments commonly assert that there exists a right to derogate from human rights norms to safeguard the public interest during crises. Such assertions reflect an attempt to reconcile individual and aggregate interests.¹ This task becomes especially difficult in situations of public emergency.² Crisis or emergency situations usually involve violence and the imminent or actual breakdown of minimum order. In such situations, insistence on special individual interests can have serious detrimental effects on community welfare. The need to accommodate both sets of claims is recognized in international documents dealing with the protection of human rights as well as in national instruments safeguarding basic rights and fundamental freedoms.³ While it is clear that individual rights are not absolute, the international community must guard against spurious invocations of community interests to excuse violations of human rights. Such invocations are typically made to facilitate the task of power elites in ruling a community or, worse, to further their special interests.⁴

International documents for the protection of human rights use several techniques to reconcile individual rights with community interests.⁵ One such technique is an "accommodation clause" which

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1. See M. McDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 413-15 (1980).

2. *Id.* at 158-59.

3. See the respective provisions in the constitutions of the following countries: Finland, art. 16 (1919); France, art. 36 (1958); Greece, art. 48 (1975); the Netherlands, art. 202 (1972); Portugal, art. 19 (1976); Turkey, art. 124 (1961); Spain, art. 55 (1978). See also O'Boyle, *Emergency Situations and the Protection of Human Rights; A Model Derogation Provision for a Northern Ireland Bill of Rights*, 28 N. IRELAND LEGAL Q. 160 (1977); Koja, *Staatsnotstand, Notstandsrecht und Ausnahmezustand in Verfassungen europäischer Staaten*, 37 UNIVERSITAS 173 (1982).

4. See M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 1, at 803-05.

5. See Higgins, *Derogations under Human Rights Treaties*, 48 BRIT. Y.B. INT'L LAW 281 (1976-77); Stein, *Derogation from Guarantees Laid Down in Human Rights Instruments*, in PROTECTION OF HUMAN RIGHTS IN EUROPE 123 (I. Maier ed. 1982).

provides that the right in question shall be subject to limits dictated by such considerations as public order, national security, and general welfare.⁶ Paragraph 2 of article 8 of the European Convention on Human Rights dealing with the right to respect for private and family life, the home, and correspondence is a good example:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁷

Another commonly used technique is a "derogation clause" allowing partial or complete suspension of certain rights in situations of public emergency.⁸ Examples of this kind of provision are article 15 of the European Convention on Human Rights, article 4 of the International Covenant on Civil and Political Rights⁹ and article 27 of the American

6. For a survey, see M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 1, at 806-13; see also Higgins, *supra* note 5, at 283-86, 307-15.

7. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 84, 213 U.N.T.S. 221, reprinted in EUROPEAN CONVENTION ON HUMAN RIGHTS, COLLECTED TEXTS 101 (Council of Europe 1981) [hereinafter European Convention].

8. See Schwelb, *Some Aspects of the International Conventions on Human Rights of December 1966*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS 103, 115-17 (A. Eide & A. Schou eds. 1968); M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 1, at 813-15; van Hoof, *The Protection of Human Rights and the Impact of Emergency Situations Under International Law with Special Reference to the Present Situation in Chile*, 10 HUMAN RIGHTS J. 213, 233-38; Green, *Derogation of Human Rights in Emergency Situations*, 16 CAN. Y. B. INT'L LAW 92 (1978); Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF RIGHTS 80 (L. Henkin ed. 1981); Quesiaux, *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as State of Siege or Emergency*, Progress report to the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the U.N. COMMISSION ON HUMAN RIGHTS, U.N. Doc. E/CN. 4/Sub.2/490 (1981).

9. The International Covenant on Civil and Political Rights, art. 4 states that:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966).

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Convention on Human Rights.¹⁰ Article 15 of the European Convention provides:

1. In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are being fully executed.¹¹

The underlying policy is to provide for limited noncompliance in order to obviate the need for more far-reaching limitations of human rights. In the absence of such a legal safety valve, states might hesitate to join the Convention or might attach more significant reservations to their accession. Moreover, in situations of actual emergency, such as war, civil strife, or revolution, national elites may regard compliance as a low priority and may resort to broader claims to derogation like “necessity” or may even denounce the Convention altogether. While a reservation to accession permits partial, uncontrolled, and permanent limitations and a denunciation allows a complete and uncontrolled ter-

10. American Convention on Human Rights, art. 27, “Suspension of Guarantees,” states that:

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to juridical personality), Article 4 (Right to life), Article 5 (Freedom from torture), Article 6 (Freedom from slavery), Article 9 (Freedom from *post facto* laws), Article 12 (Freedom of conscience and religion), Article 17 (Rights of the family), Article 13 (Right to a name), Article 19 (Rights of the child), Article 20 (Right to nationality), and Article 23 (Right to participate in government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the rights of suspension shall immediately inform the other States Parties, through the Secretary-General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

O.A.S. Official Records OEA/Ser.K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1 (1970).

11. For a short history of the provision, see Higgins, *supra* note 5, at 289.

mination, a derogation clause, such as article 15 of the European Convention, allows only for partial, controlled, and temporary limitations.

Derogation clauses, therefore, offer undeniable advantages. Nevertheless, they should be formulated and applied in accordance with important basic policies:

1. Foremost and most fundamental is the principle of reasonable accommodation between the necessities of community interests and justified particular individual interests.
2. Derogations must be accompanied by official proclamations and notifications giving all relevant details.
3. Derogations must be subject to effective outside supervision in order to prevent abuse.
4. Derogations must be used only in situations of absolute necessity in which other means cannot reasonably be expected to safeguard public order.
5. Derogations must be applied subject to strict proportionality. This means: (1) that the derogation should only apply to those rights which have to be limited to cope with the emergency; and (b) that the limitation should only apply to the extent absolutely required.
6. Derogations should be withdrawn as soon as circumstances permit.

II. Past Practice of Derogation

This section concentrates on the European Convention on Human Rights, though comparative aspects are also included.¹² Past practice with respect to derogation consists of the declarations of derogation made by Member States under article 15, paragraph 3 of the Convention and of the cases which have been brought to the international organs supervising the application of the Convention.

The European Convention is subject to a strict, impartial and nonpoliticized international supervision by its Commission (Commission) and the European Court of Human Rights (Court). Proceedings before these organs have included three major cases dealing with the

12. See also J. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 245-250 (1969); A. DEL. RUSSO, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 123-28, 155-59 (1971); Partsch, *Experiences Regarding the War and Emergency Clause of the European Convention on Human Rights*, 1 ISRAEL Y.B. ON HUMAN RIGHTS 327 (1971); F. CASTBERG, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 165-70 (1974); F. JACOBS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 204-09 (1975); Higgins, *supra* note 5, at 289-307; O'Boyle, *supra* note 3, at 178-84.

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question of derogation: The *Lawless Case*¹³ against the Republic of Ireland, which originated from an individual complaint and was examined by the Commission and by the Court; the case against Greece,¹⁴ which originated from a complaint by several other Member States and did not reach the Court; and the case of *Ireland v. United Kingdom*¹⁵ which was examined by the Commission and the Court.

The relevant provisions of the International Covenant on Civil and Political Rights and of the American Convention on Human Rights are strikingly similar to article 15 of the European Convention, though there are some differences. European practice should therefore also offer important authority on the application of these provisions.

A. Notification

Paragraph 3 of article 15 of the European Convention requires notification to the Secretary General of the Council of Europe of all measures taken under the derogation clause and of the reasons therefore. Four parties to the Convention have availed themselves of this possibility: the United Kingdom, Ireland, Greece, and Turkey.

By 1966 the United Kingdom had given a number of notices of derogation with respect to certain of its overseas territories.¹⁶ These derogations almost exclusively concerned measures of administrative detention. The territories have since become independent, and the European Convention on Human Rights no longer applies to them. The second group of derogations by the United Kingdom concerns Northern Ireland. These derogations also provide for measures of administrative arrest and detention. Notice was first given in 1957 and has

13. Report of the European Commission on Human Rights, *Lawless Case* (*Lawless v. Ireland*), 1960-1961 E.C.H.R., ser. B, at 9 [hereinafter Commission Report in *Lawless Case*]; *Lawless Case* (*Lawless v. Ireland*), 1961 Y.B. EUR. CONV. ON HUMAN RIGHTS 438 (Eur. Court of Human Rights).

14. The Greek Case, 1969 [THE GREEK CASE] Y.B. EUR. CONV. ON HUMAN RIGHTS 1 (Eur. Comm'n on Human Rights).

15. Report of the European Commission on Human Rights (*Ireland v. U.K.*), 1976-78 E.C.H.R., ser. B, vol. 23-I, at 8 [hereinafter Commission Report in *Ireland Case*]; *Ireland v. U.K.*, [1978] 2 E.H.R.R. 25 (Eur. Court of Human Rights).

16. These territories included Malaya, Singapore, Kenya, British Guiana, Uganda, Cyprus, Northern Rhodesia, Nyasaland, Aden, Zanzibar, and Mauritias. See 1955-1957 Y.B. EUR. CONV. ON HUMAN RIGHTS 48-51 (Eur. Comm'n on Human Rights); 1958-1959 Y.B. EUR. CONV. ON HUMAN RIGHTS 78-86 (Eur. Comm'n on Human Rights); 1960 Y.B. EUR. CONV. ON HUMAN RIGHTS 68-90 (Eur. Comm'n on Human Rights); 1961 Y.B. EUR. CONV. ON HUMAN RIGHTS 38-54 (Eur. Comm'n on Human Rights); 1962 Y.B. EUR. CONV. ON HUMAN RIGHTS 8-10 (Eur. Comm'n on Human Rights); 1963 Y.B. EUR. CONV. ON HUMAN RIGHTS 32 (Eur. Comm'n on Human Rights); 1964 Y.B. EUR. CONV. ON HUMAN RIGHTS 28-30 (Eur. Comm'n on Human Rights); 1965 Y.B. EUR. CONV. ON HUMAN RIGHTS 10-16 (Eur. Comm'n on Human Rights); 1966 Y.B. EUR. CONV. ON HUMAN RIGHTS 16-20 (Eur. Comm'n on Human Rights).

since been renewed and amended several times.¹⁷ The United Kingdom, though it has made relatively frequent use of article 15, has never applied the derogation clause to England, Scotland, and Wales.

The Republic of Ireland has given notices of derogation for the periods 1957-1962 and 1976-1977.¹⁸ Both notices concerned measures of administrative detention that were subject to certain safeguards and that were later withdrawn. The United Kingdom and Ireland always gave detailed information concerning the precise nature of the measures to be taken and the reasons for the derogations.

By contrast, in 1967, Greece gave notice of the suspension of an extensive list of articles of its constitution.¹⁹ Subsequent communications supplied information concerning the alleged necessity of this step and details concerning relaxations of the derogation.²⁰ The Commission found these notices incomplete.²¹

Turkey has given the most far-reaching notices of derogation. They span the years 1961, 1963-1964, 1970-1975, and the years since 1978.²² The reasons given for the steps are not compelling and, more important, the extent of the derogations is unspecified. The notices simply refer to states of emergency, siege, or martial law. It is obvious that these notices do not satisfy the requirement to provide full information concerning the measures taken. Unfortunately, the compatibility of the

17. 1955-1957 Y.B. EUR. CONV. ON HUMAN RIGHTS 50 (Eur. Comm'n on Human Rights); 1969 Y.B. EUR. CONV. ON HUMAN RIGHTS 72-74 (Eur. Comm'n on Human Rights); 1971 Y.B. EUR. CONV. ON HUMAN RIGHTS 32 (Eur. Comm'n on Human Rights); 1973 Y.B. EUR. CONV. ON HUMAN RIGHTS 24-28 (Eur. Comm'n on Human Rights); 1975 Y.B. EUR. CONV. ON HUMAN RIGHTS 18 (Eur. Comm'n on Human Rights); 1978 Y.B. EUR. CONV. ON HUMAN RIGHTS 22 (Eur. Comm'n on Human Rights).

18. 1955-1957 Y.B. EUR. CONV. ON HUMAN RIGHTS 47-48 (Eur. Comm'n on Human Rights); 1962 Y.B. EUR. CONV. ON HUMAN RIGHTS 6 (Eur. Comm'n on Human Rights); 1976 Y.B. EUR. CONV. ON HUMAN RIGHTS 20-24 (Eur. Comm'n on Human Rights); 1977 Y.B. EUR. CONV. ON HUMAN RIGHTS 20 (Eur. Comm'n on Human Rights).

19. 1967 Y.B. EUR. CONV. ON HUMAN RIGHTS 26-36 (Eur. Comm'n on Human Rights).

20. *Id.* at 38-44; 1969 Y.B. EUR. CONV. ON HUMAN RIGHTS 38-72 (Eur. Comm'n on Human Rights).

21. The Greek Case, 1969 [THE GREEK CASE] Y.B. EUR. CONV. ON HUMAN RIGHTS 41-43 (Eur. Comm'n on Human Rights).

22. 1961 Y.B. EUR. CONV. ON HUMAN RIGHTS 54-62 (Eur. Comm'n on Human Rights); 1964 Y.B. EUR. CONV. ON HUMAN RIGHTS 22-26 (Eur. Comm'n on Human Rights); 1970 Y.B. EUR. CONV. ON HUMAN RIGHTS 18-22 (Eur. Comm'n on Human Rights); 1971 Y.B. EUR. CONV. ON HUMAN RIGHTS 24-32 (Eur. Comm'n on Human Rights); 1972 Y.B. EUR. CONV. ON HUMAN RIGHTS 16-22 (Eur. Comm'n on Human Rights); 1973 Y.B. EUR. CONV. ON HUMAN RIGHTS 16-24 (Eur. Comm'n on Human Rights); 1974 Y.B. EUR. CONV. ON HUMAN RIGHTS 24-28 (Eur. Comm'n on Human Rights); 1975 Y.B. EUR. CONV. ON HUMAN RIGHTS 8-16 (Eur. Comm'n on Human Rights); 1978 Y.B. EUR. CONV. ON HUMAN RIGHTS 20 (Eur. Comm'n on Human Rights); 1979 Y.B. EUR. CONV. ON HUMAN RIGHTS 26-30 (Eur. Comm'n on Human Rights).

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Turkish derogations with the Convention has, so far, not been examined by the Commission or the Court.

Surprisingly, article 15 of the European Convention does not contain time limits for notification of derogations. By contrast, article 4(3) of the International Covenant on Civil and Political Rights²³ and article 27(3) of the American Convention on Human Rights²⁴ require immediate transmission of such information. Presumably, these provisions will be interpreted to require that such information must be forthcoming not later than the time of the imposition of the measures of derogation.

Examination of the notices of derogation submitted by Member States reveals that there have been considerable delays in notification, especially in the earlier years of the Convention. In particular, the notices of derogation provided by the United Kingdom with respect to its overseas territories were often submitted only months or even years after the imposition of administrative detention. Recently, compliance has improved greatly and notifications are provided within days of the imposition of measures derogating from the Convention. In the cases brought before the Commission and the Human Rights Court, it was found that there was no obligation to inform the Secretary-General prior to the imposition of the measures in question and that notice within twelve days to three weeks was to be regarded as timely.²⁵

Governments also are required to give a specific and timely statement of the reasons for derogation.²⁶ In the case against Greece, the Commission found that communication of the reasons for derogation more than four months after its imposition was unduly late. The Commission also found that information supplied after it had received a complaint could not replace the communication to the Secretary General required by article 15(3).²⁷

Governments must give information concerning the nature of the measures taken, but there is no obligation specifically to indicate from which articles of the Convention derogation is made. The communica-

23. *See supra* note 9.

24. *See supra* note 10.

25. Commission Report in *Lawless Case*, *supra* note 13, at 73; *Lawless Case* (*Lawless v. Ireland*), 1961 Y.B. EUR. CONV. ON HUMAN RIGHTS 438, 482-84 (Eur. Court of Human Rights); *The Greek Case*, 1969 [THE GREEK CASE] Y.B. EUR. CONV. ON HUMAN RIGHTS 1, 41-43 (Eur. Comm'n on Human Rights).

26. Commission Report in *Lawless Case*, *supra* note 13, at 73-74; *Lawless Case* (*Lawless v. Ireland*), 1961 Y.B. EUR. CONV. ON HUMAN RIGHTS 438, 482 (Eur. Court of Human Rights).

27. *The Greek Case*, 1969 [THE GREEK CASE] Y.B. EUR. CONV. ON HUMAN RIGHTS 1, 41-43 (Eur. Comm'n on Human Rights).

tion of the legislative text providing for the derogation is permissible.²⁸ By contrast, both the International Covenant on Civil and Political Rights and the American Convention on Human Rights require precise information identifying which provisions of the respective treaties a Member purports to derogate.

A violation of the requirement to give notification apparently does not render the derogation automatically void.²⁹ In the case against Greece, the Commission proceeded to investigate the merits of the derogation after having found its notification defective. Noncompliance with the obligation to give notice, however, will probably provide *prima facie* evidence of bad faith and thus may affect the decision on the merits.³⁰

B. *Supervision*

Application of the derogation clause contained in article 15 is subject to the same international supervision as is the rest of the European Convention on Human Rights. Complaints are first referred to the Commission either by Member States³¹ or by individuals, provided that the state against which the complaint is directed has recognized the right to individual petition.³² If the Commission finds the petition admissible, it attempts to secure a friendly settlement. In the process, it undertakes a full investigation of the case and ascertains all the relevant facts.³³ In the event that a friendly settlement can be achieved, the case is closed with a brief report.³⁴ Otherwise, the Commission prepares a full report that includes a statement of whether the facts disclose a breach of the Convention.³⁵ If the case is not referred to the Court, then the Committee of Ministers, a political body of the Council of Europe, decides whether there has been a violation of the Convention and on any measures to be taken by the Member State.³⁶

The jurisdiction of the European Court of Human Rights is subject

28. Commission Report in *Lawless Case*, *supra* note 13, at 74; *Lawless Case* (*Lawless v. Ireland*), 1961 Y.B. EUR. CONV. ON HUMAN RIGHTS 438, 484 (Eur. Court of Human Rights). The *Greek Case*, 1969 [THE GREEK CASE] Y.B. EUR. CONV. ON HUMAN RIGHTS 1, 41 (Eur. Comm'n on Human Rights).

29. The question was left open by the Commission Report in the *Lawless Case*, *supra* note 13, at 74.

30. See also Higgins, *supra* note 5, at 290-93.

31. European Convention, *supra* note 7, art. 24.

32. *Id.* art. 25.

33. *Id.* art. 28.

34. *Id.* art. 30.

35. *Id.* art. 31.

36. *Id.* art. 32.

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to optional declarations by Member States.³⁷ In any event, the Court may only deal with a case after the completion of proceedings before the Commission.³⁸ A case may be referred to the Court either by the Commission or by a state involved in the case, but not by individuals. Proceedings before the Court are completed by a judgment which is final.

Significantly, all the major cases dealing with the emergency clause of the Convention, with the exception of the *Lawless Case*, have been initiated by state petitions. This is partially due to the absence of a submission to the right of individual petition by the derogating Member such as in the cases of Greece and Turkey. With respect to Turkey, it took three and a half years from the imposition of martial law on December 26, 1978, until several Member States filed a complaint with the Commission in mid-1982.

Judicial supervision of emergency measures is obviously a difficult task requiring examination of social context and involving a certain amount of political judgment. The Commission and the Court have found that the states concerned must themselves assess all relevant factors, determine whether a state of emergency requiring measures of derogation existed, and identify which measures were strictly required. The government is afforded a margin of appreciation, but its determination is not accepted as conclusive.³⁹ In all cases, the international supervisory organs ultimately decided whether the state had used its discretion properly.⁴⁰ In the words of the Court:

It falls in the first place to each Contracting State, with its responsibility for "the life of its nation," to determine whether that life is threatened by a "public emergency" and, if so, how far is it necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope

37. *Id.* art. 46.

38. *Id.* art. 47.

39. Velu, *Le Contrôle des organes prévus par la Convention européenne des droits de l'homme sur le but, le motif et l'objet des mesures d'exception dérogeant à cette Convention*, in MELANGES OFFERTS À HENRY ROLIN 462 (1964); Morisson, *Margin of Appreciation in European Human Rights Law*, 6 HUMAN RIGHTS J. 263 (1973); Higgins, *supra* note 5, at 296-301; Stein, *supra* note 5, at 128-30; Kelly, *The European Convention on Human Rights and States Parties: International Control of Restrictions and Limitations*, in PROTECTION OF HUMAN RIGHTS IN EUROPE 163 (I. Maier ed. 1982).

40. *Lawless Case (Lawless v. Ireland)*, 1961 Y.B. EUR. CONV. ON HUMAN RIGHTS 438, 470-86 (Eur. Court of Human Rights); *First Cyprus Case*, 1958-1959 Y.B. EUR. CONV. ON HUMAN RIGHTS 176 (Eur. Comm'n on Human Rights); *The Greek Case*, 1969 [THE GREEK CASE] Y.B. EUR. CONV. ON HUMAN RIGHTS 1, 72-76.

of derogations necessary to avert it. In this matter Article 15(I) leaves those authorities a wide margin of appreciation.

Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States' engagements . . ., is empowered to rule on whether the States have gone beyond the "extent strictly required by the exigencies" of the crisis. . . . The domestic margin of appreciation is thus accompanied by a European supervision.⁴¹

It is clear that not only the question of the existence of an emergency but also all other aspects of a derogation, including the proportionality of the measures actually taken, are subject to the supervision of the international organs.

C. *Necessity: the Existence of a Public Emergency*

In determining the necessity of a derogation, the first question must be to inquire what circumstances justify a derogation. In other words, what constitutes a "public emergency threatening the life of the nation"?⁴²

The Convention is quite vague concerning the community values affected. One possible interpretation is that the threat to the life of the nation is to be understood as a threat to the existing power structure. More specifically, ruling elites who believe that their position or the constitutional structure on which it rests is endangered are entitled to derogate from human rights obligations. In this generalized form, such a claim is hardly acceptable. It would mean that nonviolent opposition or even an election victory by the opposition party might justify derogation. A solution to this dilemma might be to accept such a claim only in favor of democratic political systems, but to deny it to totalitarian regimes. This reading of "emergency threatening the life of the nation" might be acceptable in the framework of the Council of Europe with its relatively homogeneous political values and power structures, but it is probably unworkable on a global level. Ideas about democracy and about a preferred political order are too diverse to provide a viable consensus on this question.

Another approach to defining "emergency" for the purpose of allowing derogations would be to look at the well-being of the community in terms of the physical well-being of the population, especially in situations of extensive violence. Large scale terrorism or civil war af-

41. Ireland v. U.K., [1978] 2 E.H.R.R. 25, 91-92 (Eur. Court of Human Rights) (footnote omitted).

42. See also Higgins, *supra* note 5, at 301-02; Stein, *supra* note 5, at 130-32.

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fecting large segments of the population might be regarded as justifying derogations. The phrase “war or other public emergency” adds a connotation of violence to the provision and therefore would seem to support this interpretation. From the perspective of accommodating community and individual interests, this interpretation is probably the most convincing one. There is, however, one danger: a government or other power elite wishing to invoke the derogation clause might be tempted to provoke an atmosphere of violence in order to support its claim that an emergency threatening the life of the nation exists.

An investigation into the meaning of “emergency threatening the life of the nation” might also be undertaken with the help of other values. The economic condition of a community might be invoked, yet the consequences of such a justification are unpredictable. An economic emergency, for example, might be put forward as justification for the introduction of forced labor. Massive immigration might serve as a basis for a claim of an emergency threatening the ethnic identity of a community, justifying mass expulsion or sterilization. The potential dangers of a broad interpretation of the concept of public emergency are evident.

With respect to practice under the European Human Rights Convention, we can identify certain types of claims made by governments to support derogations. In the *Lawless Case*,⁴³ the Irish government relied primarily on the warlike operations of the Irish Republican Army (IRA) against the authorities in Northern Ireland and an attempt to involve the Irish state in a war against a foreign state.⁴⁴ The government also pointed to the horrors of civil war in Northern Ireland, that is, outside the territory of the Republic. With respect to this territorial aspect, the government emphasized its international law obligation to prevent the use of its territory as a base for terrorist attacks abroad and the special responsibility of members of the Council of Europe to each other.⁴⁵ The applicant countered these arguments by claiming that he belonged to a political movement in the Republic of Ireland and that the military activities in Northern Ireland were carried out mainly by residents there.⁴⁶

Both the Commission and the Court accepted the Irish government’s contentions in this case. The Court defined “public emergency threat-

43. *Lawless Case (Lawless v. Ireland)*, 1961 Y.B. EUR. CONV. ON HUMAN RIGHTS 438 (Eur. Court of Human Rights). For a synopsis of the *Lawless Case*, see A. ROBERTSON, HUMAN RIGHTS IN EUROPE 112-39 (1963).

44. Commission Report in *Lawless Case*, *supra* note 13, at 76.

45. *Id.* at 88-89.

46. *Id.* at 77-78.

ening the life of the nation" somewhat ambiguously as "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed."⁴⁷ There were a number of factors which the Court found relevant: (1) the existence of a secret army (the IRA) engaged in unconstitutional activities and using violence to attain its ends; (2) the fact that this army was also operating outside State territory, jeopardizing the Republic of Ireland's relations with its neighbor; and (3) the steady and alarming increase in terrorist activities.⁴⁸ The Court emphasized the threat that these activities posed to the life of the Irish Republic.⁴⁹

In the second case concerning Northern Ireland, the inter-State application of *Ireland v. United Kingdom*, the claims made by the respondent government to justify the derogations were similar. They pointed to extensive shooting, bombing, and rioting. The main reasons given for the necessity to take emergency measures were the inability of the ordinary criminal courts to restore peace and order, the widespread intimidation of the population, and the difficulties for control presented by the easy escape across the border.⁵⁰

In this case, the applicant government did not contest the existence of an emergency. Still, could it really be said that the disturbances in Northern Ireland "threatened the life of the nation," i.e., of the United Kingdom? In *The Greek Case*, the Commission had required that an emergency invoked for purposes of article 15 must affect the whole nation.⁵¹ The fact that the emergency affected only Northern Ireland does not seem to have worried either the applicant government or the Commission and Court.⁵² This appears to be sound policy. The recognition of a crisis situation affecting a certain region cannot depend on the question of whether it extends to the entire nation-state, including all other regions or provinces and, possibly, overseas territories. Such a requirement would put undue restrictions on states with large territories inhabited by politically and ethnically diverse populations. It would also invite a government to extend notices of derogation to its

47. *Lawless Case (Lawless v. Ireland)*, 1961 Y.B. EUR. CONV. ON HUMAN RIGHTS 438, 472-74 (Eur. Court of Human Rights).

48. *Id.* at 474.

49. *Id.*; see also Opinion of Five Members of the Commission, in Commission Report in *Lawless Case*, *supra* note 13, at 83.

50. Commission Report in *Ireland Case*, *supra* note 15, at 75-86.

51. *The Greek Case*, 1969 [THE GREEK CASE] Y.B. EUR. CONV. ON HUMAN RIGHTS 1, 72 (Eur. Comm'n on Human Rights).

52. Commission Report in *Ireland Case*, *supra* note 15, at 117; *Ireland v. U.K.*, [1978] 2 E.H.R.R. 25, 91 (Eur. Court of Human Rights).

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entire territory, beyond where it would be absolutely necessary.⁵³

The claims put forward by the government in *The Greek Case* to justify the derogation were substantially different from those offered in the two Irish cases. Invocation of the derogation clause in the two Irish cases was justified in terms of the well-being of the population in the face of terrorist violence, while the revolutionary government of Greece relied primarily on considerations of power. The main arguments were the danger of a Communist takeover and the crisis of constitutional government as evidenced by a rapid succession of governments, by corruption, by strikes, and by an ailing economy. A third argument was that there was a crisis of public order in the form of violent demonstrations.⁵⁴

Examination of the factual evidence presented in the Commission's report on the Greek case indicates that the situation became considerably more violent after the military coup and the imposition of the derogations.⁵⁵ The applicant governments in fact pointed out that a revolutionary government could hardly justify derogation by relying on an emergency which it had created itself.⁵⁶ In its report on this case the Commission attempted to give a general and comprehensive list of requirements for a "public emergency":

- (1) It must be actual or imminent.
- (2) Its effects must involve the whole nation.
- (3) The continuance of the organised life of the community must be threatened.
- (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.⁵⁷

The Commission added that the burden of proof lay on the government to show that the conditions for derogation had been satisfied throughout the period of the derogation. Greece had failed to do this in the particular case.⁵⁸ It is worth noting that the Commission did not dismiss the government's argument concerning the threat of a Communist takeover as being outside the scope of a "public emergency threatening the life of the nation." It merely found that there was insufficient evidence in this respect.⁵⁹

53. See Buerghenthal, *supra* note 8, at 80.

54. The Greek Case, 1969 [THE GREEK CASE] Y.B. EUR. CONV. ON HUMAN RIGHTS 1, 45-71 (Eur. Comm'n on Human Rights).

55. See *id.* at 92-100.

56. *Id.* at 32.

57. *Id.* at 72.

58. *Id.* at 72-76.

59. *Id.* at 76.

D. Proportionality: The Extent Strictly Required

Determining whether measures derogating from the obligations of the Convention were taken only to the extent strictly required raises difficult questions concerning proportionality. A number of questions should be asked:

1. Is the derogation of the particular guaranteed right the only way to cope with the emergency or are there less drastic alternatives?
2. How far must the derogation of this right extend?
3. Are there any checks and safeguards against excessive or unnecessary use of the derogation?
4. Did the government relax or terminate the derogation as soon as this was possible?

1. The Rights Affected

The practice with respect to proportionality shows a clear difference in approach between the *Northern Ireland* cases and *The Greek Case*. Both Irish cases involved measures of administrative detention. In the case against the United Kingdom, the government had resorted not only to internment of suspects but also to temporary detention of witnesses. This, it was claimed, was necessary to obtain evidence in the face of widespread intimidation of the population.⁶⁰ In both cases the respective respondent governments emphasized that the ordinary means provided by the law were insufficient to cope with the situation.⁶¹ In both cases the applicants denied the inadequacy of ordinary legal means and branded the detention measures excessive.⁶²

By contrast, *The Greek Case* involved the suspension of a wide range of human rights. Evidence showed violations of the right to protection against arbitrary detention, to a fair trial, to respect for one's home, to freedom of expression, to freedom of thought, conscience, and religion, to freedom of assembly and association, to an effective remedy against human rights violations, and to free elections.⁶³ In addition, there were violations of rights which were not even subject to derogation.⁶⁴

The practice of the Commission and of the Court on the question of proportionality shows the application of strict standards.⁶⁵ For in-

60. Commission Report in Ireland Case, *supra* note 15, at 85.

61. Commission Report in Lawless Case, *supra* note 13, at 104; Commission Report in Ireland Case, *supra* note 15, at 79.

62. Commission Report in Lawless Case, *supra* note 13, at 102-03; Commission Report in Ireland Case, *supra* note 15, at 86-92.

63. The Greek Case, 1969 [THE GREEK CASE] Y.B. EUR. CONV. ON HUMAN RIGHTS 1, 134-36, 147-49, 152-53, 164-65, 170-72, 174, 179-80 (Eur. Comm'n on Human Rights).

64. *Id.* at 498-505.

65. See Higgins, *supra* note 5, at 302-05; Stein, *supra* note 5, at 132.

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stance, the existence of a high level of violence was not automatically accepted as requiring measures like administrative detention.⁶⁶ Both bodies examined the measures in the light of possible alternatives that would not require a derogation. In the *Lawless Case*,⁶⁷ and in *Ireland v. United Kingdom*,⁶⁸ the Court came to the conclusion that ordinary law had been shown insufficient to cope with the crisis. In particular, the resources of ordinary criminal courts, special criminal courts, and military courts had proven inadequate.

2. *The Extent of Measures*

The extent of a derogation must be strictly related to the situation. In other words, there must be a link between the facts of the emergency and the specific measures chosen.⁶⁹ Even where derogations are legitimate, the individual measures taken must be applied only to the extent absolutely necessary to cope with the emergency. Where administrative arrest and detention was justified in principle by the situation, for example, much stricter standards had to be applied to the arrest of witnesses not suspected of crimes, whose temporary detention was necessary in the face of intimidation, than to the detention of members of terrorist organizations in order to prevent further violence. In *Ireland v. United Kingdom*, it was found that, in light of the situation taken as a whole, the United Kingdom had complied with this flexible standard.⁷⁰ By contrast, in the case against Greece the Commission found that, even on the assumption that an emergency existed, the sweeping and unspecified derogations and the measures taken went beyond what was strictly required.⁷¹

3. *Alternative Safeguards*

The fact that an emergency calls for exceptional measures, usually by the executive, does not mean that such executive action should proceed without checks and supervision. The dangers of unnecessary and excessive use of emergency powers call for particularly stringent safeguards against abuse. In some instances, the urgency of the situation may permit only a subsequent examination of the propriety and proportionality of particular measures. Still, the realization that supervi-

66. Commission Report in Ireland Case, *supra* note 15, at 119.

67. *Lawless Case* (*Lawless v. Ireland*), 1961 Y.B. EUR. CONV. ON HUMAN RIGHTS 438, 476 (Eur. Court of Human Rights).

68. *Ireland v. U.K.*, [1978] 2 E.H.R.R. 25, 93-94 (Eur. Court of Human Rights).

69. Commission Report in Ireland Case, *supra* note 15, at 119.

70. *Id.* at 120-22; *Ireland v. U.K.*, [1978] 2 E.H.R.R. 25, 93-94 (Eur. Court of Human Rights).

71. *The Greek Case*, 1969 [THE GREEK CASE] Y.B. EUR. CONV. ON HUMAN RIGHTS 1, 135-36, 148-49, 180 (Eur. Comm'n on Human Rights).

sion exists, albeit subsequent to the measures, may have a mitigating effect on the use of emergency powers and is an important check against their excessive use. Effective domestic supervision of derogations of human rights is therefore essential to minimize the danger of disproportionate application.

In both cases dealing with Northern Ireland, *Lawless* and *Ireland v. United Kingdom*, the Court and the Commission paid great attention to so-called alternative safeguards. In the *Lawless Case*, the Court noted that there was parliamentary supervision, that the detainees could apply to an independent "Detention Commission," and that persons who satisfied certain conditions were being released.⁷² In *Ireland v. United Kingdom*, the safeguards provided by an advisory committee of commissioners and an appeal tribunal were accepted as adequate.⁷³

4. *Relaxation*

Another important aspect of proportionality is a flexible application of emergency measures. Exceptional measures which may have appeared imperative at a certain stage may become dispensable as the situation improves or as the authorities obtain a clearer picture of the details of the emergency. The temptation to maintain exceptional measures for administrative convenience after they are no longer necessary must be resisted.

Proportionality of measures at any stage of the emergency must be subject to stringent internal and international supervision. On the other hand, a relaxation should not serve as evidence that previous measures were excessive. A government faced with the possibility that a relaxation of emergency measures might be construed as an implicit admission that the measures had been disproportionate will be very reluctant to relax them.

In *Ireland v. United Kingdom*, the defendant government had relaxed its measures considerably and improved safeguards after assuming direct control of the province in March, 1972, although the situation had not improved. The Irish Government claimed that this showed that the measures in question had been unnecessary and excessive. Both the Commission⁷⁴ and the Court⁷⁵ rejected this argument. They found that evolution in the direction of increased respect for individual liberty

72. *Lawless Case* (*Lawless v. Ireland*), 1961 Y.B. EUR. CONV. ON HUMAN RIGHTS 438, 478 (Eur. Court of Human Rights).

73. Commission Report in *Ireland Case*, *supra* note 15, at 124-52; *Ireland v. U.K.*, [1978] 2 E.H.R.R. 25, 96 (Eur. Court of Human Rights).

74. Commission Report in *Ireland Case*, *supra* note 15, at 124-25.

75. *Ireland v. U.K.*, [1978] 2 E.H.R.R. 25, 93-97 (Eur. Court of Human Rights).

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merely showed that the government had exercised its discretion in a responsible way. In the words of the Commission:

The fact that the measures were improved with time whereas the crisis became more grave cannot be taken to show that the measures under the Special Powers Act ever exceeded the requirements of the situation. Experience must allow improvements to be made by a Government without its afterwards being held guilty of having violated the Convention. Otherwise this possibility might even conceivably impede the improvement of the safeguards as experience was gained.⁷⁶

E. *Other Obligations under International Law*

Article 15 of the European Convention, like article 4 of the International Covenant on Civil and Political Rights and article 27 of the American Convention, only permits derogations where such measures are not inconsistent with other obligations under international law. The policy behind this savings clause is obviously to deny governments an excuse for violating other international obligations, especially other human rights conventions. For the Members who are signatories of the European Convention, the International Covenant on Civil and Political Rights might constitute an additional set of obligations. Article 4 of the International Covenant is not identical to article 15 of the European Convention, especially with respect to the list of rights that are not subject to derogation.⁷⁷ Article 15 of the European Convention lists only the right to life,⁷⁸ the prohibition of torture, inhuman or degrading treatment or punishment,⁷⁹ the prohibition of slavery or servitude,⁸⁰ and the nonretroactivity of criminal legislation⁸¹ as rights not subject to derogation. By contrast, the list of rights not subject to derogation in the International Covenant on Civil and Political Rights is considerably longer. In addition to the list of rights in article 15 of the European Convention, it includes the prohibition of imprisonment for debt,⁸² the right to recognition as a person,⁸³ and freedom of thought, conscience, and religion.⁸⁴ The list of rights not subject to derogation in the more recent American Convention on Human Rights⁸⁵ is even longer, although, of course, it is not applicable in the European context.

76. Commission Report in Ireland Case, *supra* note 15, at 125.

77. Stein, *supra* note 5, at 126-28.

78. European Convention, *supra* note 7, art. 2.

79. *Id.* art. 3.

80. *Id.* art. 4(3).

81. *Id.* art. 7.

82. International Covenant on Civil and Political Rights, *supra* note 9, art. 11.

83. *Id.* art. 16.

84. *Id.* art. 18.

85. See *supra* note 10.

Other obligations of international law with which members of the European Convention on Human Rights must comply are the provisions of international humanitarian law, notably the four Geneva Conventions of 1949.⁸⁶ Article 15 of the European Convention is not just a general savings clause for other international obligations of Member States, but also makes an infringement of these other international obligations an additional violation of the European Convention. In a case of derogation, the international machinery of supervision of the European Convention also covers this aspect. The European Court of Human Rights has, in fact, examined the consistency of some measures of derogation with other obligations under international law, but in each instance has been satisfied that there was no violation.⁸⁷

In connection with the right to life, article 15 contains a special reference to other obligations under international law. The right to life contained in article 2 is not subject to derogation "except in respect of deaths resulting from lawful acts of war".⁸⁸ The precise meaning of this reference to "lawful acts of war" is not entirely clear. One possible interpretation would prohibit killings in contravention of the laws and customs of warfare, including international humanitarian law. Such a narrow interpretation, however, would focus exclusively on the methods of warfare and would disregard the legality of war as such. A broader reading of this provision must include the question of whether there was a violation of the prohibition of the use of force expressed in article 2(4) of the U.N. Charter. Obviously this latter interpretation has to be preferred. It would make little sense to exclude the most inhumane and obnoxious of all international crimes—waging an aggressive war—from the ambit of the European Human Rights Convention. This means that the international organs supervising the Convention may very well one day find themselves in the position of having to decide whether one of the members has waged an aggressive or otherwise illegal war. The only situation under which a member could invoke the "lawful act of war" exception would be a war of self-defense

86. Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287; Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31.

87. *Lawless Case (Lawless v. Ireland)*, 1961 Y.B. EUR. CONV. ON HUMAN RIGHTS 438, 480-82 (Eur. Court of Human Rights); *Ireland v. U.K.*, [1978] 2 E.H.R.R. 25, 97 (Eur. Court of Human Rights).

88. European Convention, *supra* note 7, art. 2.

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within the meaning of article 51 of the U.N. Charter or another internationally accepted exception to the prohibition of aggression. Even in this situation, a member would have to adhere scrupulously to the rules of warfare, especially as developed in international humanitarian law, in order to remain within the limits of article 15 of the European Convention on Human Rights. It is significant that both the International Covenant on Civil and Political Rights and the American Convention on Human Rights do not contain a "lawful acts of war" exception to the right to life. Both conventions refuse to even contemplate the possibility of a "legal" war in the context of the protection of human rights.

III. Conclusion

The foregoing review of past practice reveals a high degree of conformity with the policy preferences formulated above. The European Commission on Human Rights and the European Court of Human Rights have each examined a wide range of contextual factors in balancing community interests against individual interests. This brief survey summarized this practice at a relatively high level of abstraction, but an examination of the relevant reports and judgments *in extenso* will reveal the care and detail with which a large number of social and political aspects have been taken into consideration. The principles of necessity and proportionality have been applied rigorously.

Nevertheless, there is room for improvement, especially with respect to the procedural aspects of supervision. At present, the Secretary General of the Council of Europe simply registers notices of derogation without an examination on the merits. An investigation into whether a state has transgressed its "margin of appreciation" only takes place if a complaint is filed with the Commission subject to a possible subsequent examination by the Court.⁸⁹ Such an investigation therefore depends, *inter alia*, on whether the state in question has submitted to individual petition or to the jurisdiction of the Court and on whether there is a party entitled and willing to file a complaint. The time lost before a case was filed against Turkey demonstrates that this does not always lead to satisfactory results.

It would therefore be advisable to introduce an automatic permanent supervision of derogations. The existing right of the Secretary General of the Council of Europe to request explanations under article 57 of the European Convention on Human Rights concerning its implementa-

89. For a generally skeptical view of the Commission's role in emergency situations, see O'Boyle, *supra* note 3.

tion might serve as a starting point, but it is not sufficient. The actual supervision would have to be exercised either by the Commission or by the Committee of Ministers. Under this system, states availing themselves of the derogation clause would be required to supply the following:

1. Proof of an emergency requiring a derogation.
2. Information concerning the exact measures taken. A general declaration of a state of siege or of martial law would not be sufficient. This information should not only be accompanied by the relevant legislative texts but also by a detailed account of the measures actually taken.
3. Precise time limits for all measures.
4. Biannual reports concerning the continued necessity of the derogation, detailing any relaxations or expansions of the emergency measures.

Finally, it is worth examining whether the list of rights that are not subject to derogation should be expanded. The International Covenant on Civil and Political Rights and the American Convention each have a more extensive list of such rights. An expansion may even go beyond the lists contained in these two conventions. For instance, it is inexplicable why the right to marry⁹⁰ should ever be subjected to derogation. Perhaps the best solution is to promulgate an exhaustive list of rights subject to derogation and thereby transform the prohibition on derogation into the rule rather than the exception to article 15.

90. European Convention, *supra* note 7, art. 12.